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No. 85-1273

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ALEXANDER F. EAGLE,
Petitioner,

VS.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
a Corporation,
Respondent.

Respondent's Brief In Opposition

To Petition For A Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner's complaint sought $38 million in compensatory damages for a majority shareholder's alleged breach of fiduciary duty, and where petitioner alleged no individual damages until after removal, did the court below correctly find that the action was removable because of diversity of citizenship and more than $10,000 in controversy?

2. Should this Court review the decision below which upholds the district court's discretion in rejecting petitioner's attempt to raise a new claim (previously disavowed by petitioner) for the first time in opposition to a summary judgment motion?

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in Omnicad Technology Corporation; AT&T and Philips Telecommunications, B.V.; AT&T Ricoh Co. Ltd.; AT&T Taiwan Telecommunications Co., Ltd.; AT&T Thai Media Limited; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudia Arabia, Ltd.; AT&T Microelectronicia de Espana, S.A.; Communications Software Development, Inc.; Gold Star Semiconductor, Ltd.; Intermetrics, Inc.; Cuban American Telephone and Telegraph Company; Ing. C. Olivetti & C., S.P.A.; and Cincinnati Bell Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Preliminary Statement	1
Statement of the Case	3
Argument	9
I. The court below properly ruled that petitioner's initial complaint was removable and did not "ignore the basic rule that the plaintiff is the master of the case"	9
II. The ruling below--that petitioner may not raise a new claim in opposition to summary judgment, where petitioner had previously disavowed that claim--is consistent with the Federal Rules of Civil Procedure and the decisions of the courts of appeals	13
Conclusion	19

TABLE OF AUTHORITIES

Page

Cases

Conley v. Gibson, 355 U.S. 41 17

F & D Property Co. v. Alkire, 385 F.2d 97 18

Fowler v. Crown-Zellerbach Corporation, 163 F.2d 773 17

Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 17

Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 11

L & E Co. v. U.S.A., 351 F.2d 880 18

Pullman Co. v. Jenkins, 305 U.S. 534 10

Statutes

United States Code
Title 28, section 1332 4
Title 28, section 1441 4

Rules

Federal Rules of Civil Procedure
Rule 16(e) 16

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PRELIMINARY STATEMENT

Petitioner contends that the court below, in upholding removal, ignored the rule that the plaintiff is "master of the case" and, in upholding summary judgment, allowed the district

court to "misuse" pretrial procedure (Pet., pp. 5, 8). Neither contention has merit, and there is no basis for granting certiorari. Contrary to petitioner's assertions (Pet., pp. 4, 5), petitioner did not allege an individual claim of $4,200 in his initial complaint; that complaint sought $38 million in compensatory damage based on an alleged injury to the assets and dividends of a corporation in which petitioner owned stock. Removal was proper because petitioner's complaint alleged an amount in controversy well above the jurisdictional amount.

In upholding summary judgment against petitioner, the decision below is consistent with the Federal Rules of Civil Procedure and the decisions of the Courts of Appeals. After extensive pretrial proceedings leading to factual

stipulations and cross-motions for summary judgment, petitioner in his opposition to summary judgment attempted to raise a new claim that until then he had expressly disavowed. The court below properly held that the district court did not abuse its discretion in rejecting petitioner's belated attempt to avoid summary judgment. There is no need for review by this Court.

STATEMENT OF THE CASE

The relevant facts, which are summarized in the opinions of the district court and Court of Appeals, are as follows:

In 1981, petitioner filed an action against respondent American Telephone & Telegraph Company ("AT&T") in California state court (Pet.Appx., p. 4a). The complaint, filed on behalf of the ten-percent minority shareholders

of The Pacific Telephone and Telegraph Company ("Pacific"), alleged that AT&T used its majority control of Pacific to its own advantage and to the minority shareholders' detriment (Pet.Appx., p. 4a). Specifically, the complaint alleged that AT&T caused Pacific to forego taking accelerated depreciation and investment tax credits, that AT&T's decision caused the California Public Utilities Commission to order Pacific to refund $381 million in rates, and that the refund injured the minority shareholders by approximately $38 million (10% of the total refund) (Pet.Appx., p. 4a).

AT&T removed the action pursuant to 28 U.S.C. §§ 1332 and 1441 (Pet.Appx., p. 4a). After unsuccessfully moving for remand, petitioner filed an amended complaint (Pet.Appx., p. 4a). The amended complaint, unlike

the initial complaint, alleged that the refund caused a $3 per share depreciation in the value of each minority share, and that petitioner individually suffered damages of $4,200 (Pet.Appx., p. 4a). Petitioner then filed a second motion for remand that was also denied (Pet.Appx., p. 4a).

In 1983, pursuant to the parties' stipulation, the district court entered a pretrial order providing, among other things, that "[n]o further motions for leave to amend the complaint will be entertained except on showing of good cause based on new facts that have come into existence subsequent to the date of this order" (Pet.Appx., pp. 11a-12a, 18a-19a). Thereafter, petitioner stipulated that "[i]t is this $418 million refund [$381 million refund with interest] that forms the basis of

plaintiff's complaint in this case" (Pet.Appx., p. 19a).

The parties filed cross-motions for summary judgment based on factual stipulations, and the district court granted AT&T's motion (Pet.Appx., p. 5a).[1] The court held that the $381 million refund did not damage the minority shareholders because, if Pacific had adopted accelerated depreciation as petitioner urges it should have, Pacific would never have collected the $381 million in rates that was ultimately refunded (Pet.Appx., p. 5a); "[i]t is self-evident from the stipulated facts that [petitioner] and his fellow minority shareholders, as well as

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1 The undisputed facts are summarized in the opinions of the district court and Court of Appeals (Pet.Appx., pp. 2a-4a, 14a-17a).

Pacific, were in exactly the same position after the refund was ordered as they would have been in had Pacific [taken the course urged by petitioner]" (Pet.Appx., p. 17a). The court also held that the pretrial order precluded petitioner from asserting, for the first time in opposition to AT&T's motion for summary judgment, a previously disavowed claim that AT&T had caused Pacific to incur a tax liability that depressed the price petitioner later received for his Pacific shares (Pet.Appx., p. 5a).[2]

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2 Alternatively, the district court held that petitioner was collaterally estopped from making this new claim by a 1981 decision of the California Public Utilities Commission approving AT&T's purchase of the minority shares of Pacific. That decision rejected an identical argument advanced by petitioner (Pet.Appx., pp. 5a, 20a). The Court of Appeals did not reach this ground in affirming the district court's decision (Pet.Appx. p. 12a).

The Court of Appeals affirmed (Pet.Appx., pp. 1a-12a). It too found that the amount in controversy in the initial complaint exceeded $10,000 (Pet.Appx., p. 5a). The Court of Appeals held that summary judgment in favor of AT&T on petitioner's refund claim was correct (Pet.Appx., pp. 10a-11a) and that the district court did not abuse its discretion by enforcing the pretrial order (Pet.Appx., p. 12a). On October 30, 1985, the Court of Appeals denied a petition for rehearing (Pet.Appx., p. 13a).

ARGUMENT

I. THE COURT BELOW PROPERLY RULED THAT PETITIONER'S INITIAL COMPLAINT WAS REMOVABLE AND DID NOT "IGNORE THE BASIC RULE THAT THE PLAINTIFF IS THE MASTER OF THE CASE."

Petitioner's action was removable because there was complete diversity of citizenship (Pet.Appx., p. 5a) and the amount in controversy in petitioner's initial complaint was $38 million (Pet.Appx., p. 10a). Petitioner, however, contends that he "asserted on his own behalf a claim of $4200 * * *" (Pet., p. 4). But the record is to the contrary: As the Court of Appeals noted (Pet.Appx., p. 4a), petitioner asserted his individual claim of $4,200 for the first time in his amended complaint following removal. The extremes to which petitioner goes in an attempt to hide this fact are best

illustrated by his decision to include in the appendix to the petition only the amended complaint, which was filed after removal (Pet.Appx., pp. 24a-27a).

The Court of Appeals properly held that "[w]e confine our analysis to the claim as presented in [petitioner's] initial complaint because the amount in controversy is determined from the pleadings as they exist at the time a petition for removal is filed. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939)" (Pet.Appx., p. 6a). The initial complaint did not seek or allege individual damages to petitioner or any of the class members (see Pet.Appx., pp. 4a, 6a-7a). Instead, the complaint sought $38 million in compensatory damages and $20 million in punitive damages (Pet.Appx., p. 7a). That was the amount in controversy.

Although petitioner suggests that remand to the California courts was necessary to determine the character of petitioner's claims (Pet., pp. 7-8), the decision below correctly holds that "[o]ur starting point for determining the amount in controversy is to characterize the shareholders' claims under California state law" (Pet.Appx., p. 6a). It is settled that "the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case" (Horton v. Liberty Mut. Ins. Co. (1961) 367 U.S. 348, 352-353). The Court of Appeals properly looked to California law in determining that petitioner's initial complaint presented a "shareholders' claim for the wrongful depletion of corporate assets [which] is the common and undivided interest each shareholder has in a corporation's

assets and a right to share in dividends" (Pet.Appx., p. 9a).

There is no basis for petitioner's contention (Pet., pp. 6-7) that the court below treated his claim as a derivative action rather than an individual claim for breach of fiduciary duty. The Court of Appeals pointed out that "we are willing to assume that California would permit Pacific's former minority shareholders to bring this class action in their individual capacities" (Pet., p. 7a). Thus, petitioner is clearly wrong in asserting that the Court of Appeals "held that the claim presented by [petitioner] is derivative" and thereby "ignore[d] the basic rule that the plaintiff is the master of the case" (Pet., pp. 5, 7).

II. THE RULING BELOW--THAT PETITIONER MAY NOT RAISE A NEW CLAIM IN OPPOSITION TO SUMMARY JUDGMENT, WHERE PETITIONER HAD PREVIOUSLY DISAVOWED THAT CLAIM--IS CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DECISIONS OF THE COURTS OF APPEALS.

Contrary to petitioner's assertions (Pet., p. 8), this case simply does not present a "misuse" of pretrial procedures or the "elimination" of a claim raised by the pleadings. All that is involved here is the enforcement of a pretrial order to prevent petitioner from raising his so-called "tax liability" claim for the first time in opposition to summary judgment. The Court of Appeals correctly found that the district court did not abuse its discretion by enforcing its pretrial order (Pet.Appx., p. 12a).

The Court of Appeals correctly noted that petitioner's "initial and amended complaints allege that the minority shareholders were injured by the refund Pacific was ordered to pay. Neither complaint mentions the tax liability" (Pet.Appx., p. 12a). Petitioner stipulated, moreover, that "[i]t is this $418,000,000 refund [$381,000,000 plus interest] that forms the basis of plaintiff's complaint in this case" (Pet.Appx., p. 19a).[3] Notwithstanding

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3 Likewise, petitioner repeatedly stated in his motion for summary judgment that his claim was based solely on the refund:

> "[T]his action has been brought to recover only the damages suffered by the minority shareholders through the $417.1 million refund" (Clerk's Record on Appeal (9 Cir.), CR 52, p. 9).

And:

(footnote continued)

his own stipulation, petitioner attempted to raise a tax liability claim for the first time in reply to respondent's summary judgment motion (Pet.Appx., p. 11a)--a claim that the minority shares of Pacific had been undervalued because of a $1.5 billion tax liability that was later reduced by federal legislation (Pet.Appx., p. 11a). But petitioner had previously disavowed that claim: "The minority shareholders are not seeking damages because of the [tax] legislation. That is emphasized"

(footnote continued)

> "Plaintiff seeks damages for the injury caused by the refund" (Clerk's Record on Appeal (9 Cir.) CR 52, p. 99).

During oral argument in district court, petitioner insisted that "this case is predicated on the action of the PUC in requiring the $400-odd million to be refunded" (Reporter's Transcript, p. 11).

(Clerk's Record on Appeal (9 Cir.) CR 52, p. 97).

Under the circumstances, the district court did not abuse its discretion in ruling that the new claim was precluded by a pretrial order providing that "[n]o further motions for leave to amend the complaint will be entertained except on showing of good cause based on new facts that have come into existence subsequent to the date of this order" (Pet.Appx., pp. 11a-12a). Rule 16 of the Federal Rules of Civil Procedure provides that a pretrial "order shall control the subsequent course of the action unless modified by a subsequent order" (Fed.Rules Civ.Proc., Rule 16(e)). Enforcement of Rule 16 is particularly appropriate where, as here, the pretrial order was entered only after petitioner "represented that no further amendments of his complaint are necessary or will

be sought" (Clerk's Record on Appeal (9 Cir.) CR 44, pp. 1-2).[4]

There is no authority in conflict with the decision below on this point (see Pet., pp. 10-12).[5] It is settled that a district court may consider all party admissions in a summary judgment proceeding--including

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4 Petitioner may not object to a pretrial order that "was made with the cooperation and assent of both parties" (Fowler v. Crown-Zellerbach Corporation (9 Cir. 1947) 163 F.2d 773, 774).

5 In quoting from Conley v. Gibson (1957) 355 U.S. 41 (Pet., p. 9) petitioner omits that portion of the Conley opinion which recognizes that "pretrial procedures [are] established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues" (355 U.S. 47-48). Moreover, contrary to petitioner's erroneous assertion (Pet., p. 11), a pretrial order may control not only "facts," but also "theories during trial" (Hale v. Firestone Tire & Rubber Co. (8 Cir. 1985) 756 F.2d 1322, 1335; cited at Pet., p. 11).

admissions made at a pretrial conference, in a pleading or brief, or in a stipulation by counsel (e.g., F & D Property Co. v. Alkire (10 Cir. 1967) 385 F.2d 97, 100). Summary judgment may be granted where a party attempts to raise an issue that has been previously excluded from the case by a pretrial order (L & E Co. v. U.S.A. (9 Cir. 1965) 351 F.2d 880, 882). This is not a case where petitioner's counsel "used inept phraseology" (Pet., p. 11). The record shows that petitioner deliberately attempted to change his claim in an eleventh-hour attempt to avoid summary judgment (Pet.Appx., p. 12a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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